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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 686

ROBERT JOSEPH MOLKENBUR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on August 14, 1970.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially recorded, but is printed as Appendix A, *infra* (hereinafter cited as "App. A").

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on August 14, 1970. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

I. Is it a violation of the Fourth Amendment for police officers to enter a person's home and curtilage by force, without warrants of any kind, arrest the person living therein and seize merchandise in plain view which the police suspect is stolen property, but which they have no knowledge of its being stolen? Should this Court review such practice under its supervisory powers, when said merchandise is used as evidence against a defendant in a criminal trial in Federal District Court?

II. Is the Fourth Amendment's prohibition against unreasonable seizures violated when police officers seize merchandise within the curtilage, 1) without warrants of any kind, 2) without the consent of either the owner of the premises or the defendant charged with unlawful possession thereof; and 3) without knowledge that the seized merchandise was stolen?

III. Is the warrantless search at the police station of a box seized from within the curtilage of a person's home, after his arrest and after his being taken in custody to the police station, too remote in time or place to have been incidental to his arrest?

IV. Can the government at trial in Federal District Court rely upon the alleged consent of a defendant to sustain its contention that its seizure of merchandise found within the curtilage was lawful, but on appeal change its theory and urge for the first time that the seizure was made incident to a co-defendant's arrest?

V. Did the government sustain its burden of proving that the police had probable cause to arrest petitioner and co-defendant, where the Court of Appeal's opinion acknowledges that the police's informant had no personal knowledge concerning the merchandise seized by the police and the police had no knowledge that the merchandise had in fact been stolen?

VI. Does **Chimel v. California**, 395 U. S. 752, overrule the doctrine that items which are in plain view can be seized?

VII. Does this Court's holding in **Chambers v. Maroney**, ... U. S. ..., apply to searches and seizures of personal property seized within the curtilage of a person's home?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment, Constitution of the United States, provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * *."

The Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *."

The Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense."

STATEMENT

Petitioner Robert Molkenbur and Ernest Toler were indicted for unlawful possession of merchandise valued at more than $100.00 stolen from an interstate shipment in violation of 18 U. S. C., Section 659. Petitioner and co-defendant Toler were convicted by a jury and the District Court entered a judgment of conviction on the verdict and sentenced the petitioner to commitment under Section 4208(b), Title 18, United States Code. Said sentence provides that petitioner be committed for study and observation for a maximum of ninety days and that after the Court receives reports and recommendations from the Director of the Bureau of Prisons, the Court shall then finally determine what sentence shall be given the petitioner. Co-defendant Toler was also convicted and sentenced, but his appeal has been dismissed.

The evidence adduced at trial and at the hearing on the motion to suppress evidence may be summarized as follows:

1. **Prior to April 16, 1969** (date of arrest).

Petitioner Molkenbur, as a truck driver for Hennis Truck Lines in St. Louis, Missouri, operated a large tractor-trailer unit. Petitioner's job was to deliver interline freight to various local truck terminals prior to its trans-shipment outside of St. Louis.

Detective Herman Ubben, Police Officer for the City of St. Louis, testified that on April 1, 1969 he received in-

formation that a large Hennis Motor Freight Lines truck had stopped at 1509 East Gano in the City of St. Louis and that apparently the driver and another unknown person were seen taking boxes off the truck and placing the boxes in the house located at that address (A. 24-26).[1] This information was related to Detective Ubben by Mrs. Kathleen Rohlfing who lived at 1516 E. Gano, which was across the street and several houses down from the above-described house at 1509 East Gano. Mrs. Hazel Berghofer, mother of Kathleen Rohlfing, apparently also saw boxes being unloaded at the same time and talked to a policeman by the name of Allers (A. 35, 39-40). Allers did not testify at the hearing on the motion to suppress or at trial.

Pursuant to the information obtained from Kathleen Rohlfing, Detective Ubben conducted a surveillance at 1509 East Gano on April 12, 1969. On that date, the detective observed a Hennis Truck Line tractor-trailer stop on the street adjacent to the residence at 1509 E. Gano. Detective Ubben saw a man, subsequently identified as petitioner Molkenbur, go into the house, stay a short time and drive off in the truck. He did not observe any boxes or freight being unloaded from the truck and had no knowledge that any boxes had been stolen (A. 24-25). Detective Ubben testified that he then ascertained from an official of the Hennis Motor Freight Lines that the truck he observed was assigned to petitioner Molkenbur, both the day he saw it on April 12 and on April 1, 1969. Ubben was also advised that the truck had no scheduled stops at that address on either date (A. 25).[2]

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[1] "A" references are to pages in the printed appendix filed in the Court of Appeals and in this Court. "H Tr." and "Tr." references are to pages in the transcripts of proceedings at the hearing on the motion to suppress and at trial, respectively.

[2] Mr. Anthony Buttice, dispatcher for Hennis Motor Freight Lines and called as a government witness, testified that the driv-

It was stipulated between defense counsel and government counsel that the title to the house located at 1509 East Gano is in the petitioner's name, that he pays the utility bills and that the police knew this prior to the arrests (A. 28). Subsequently, it was determined that co-defendant Toler and his family lived at that address.

2. **Day of Arrest.**

On April 16, 1969, Mrs. Berghofer was again visiting the home of her daughter Kathleen Rohlfing. Another daughter was also visiting in the same home. While in the home, Mrs. Berghofer and her two daughters heard a truck pull up in front of 1509 E. Gano. They could see the truck by looking out of the front window of Kathleen Rohlfing's house (A. 31-32).

Kathleen Rohlfing testified that she saw petitioner Molkenbur at the rear of the Hennis truck, however, she could not recall what he was doing (A. 38). She then called Detective Ubben and told him that a truck was parked in front of 1509 East Gano. The informant (Kathleen Rohlfing) testified that she did not see any packages on that day and did not tell Detective Ubben that petitioner Molkenbur or co-defendant Toler were there (A. 38-40). She testified specifically that she never saw the box later seized by the police and introduced into evidence against petitioner (A. 39). She did state, however, that while she was on the telephone with Detective Ubben, her sister and mother said that there was a box going into

ers for Hennis could stop at any restaurant or at home for lunch as long as the place they stopped was within a reasonable distance from where the truck driver was making deliveries or pickups. Buttice stated that all the driver had to do was call in and tell the dispatcher he was going to stop for lunch. It was not necessary for him to state where he was stopping for lunch (A. 51).

the yard (A. 40). She did not testify that she relayed this information to Detective Ubben.[3]

Detective Ubben, after receiving the telephone call from Kathleen Rohlfing, notified Officers Llewellyn and Judge to proceed to 1509 East Gano. Officer Llewellyn testified that he arrested petitioner Molkenbur immediately upon arriving at 1509 East Gano, while Molkenbur was standing on the sidewalk in front of his house (A. 20-47). Officer Llewellyn testified that Molkenbur stated that he had stopped at the address to deliver a power lawn mower and that he had permission to make the stop from his dispatcher. Officer Llewellyn asked Molkenbur after he was placed under arrest if he might see the lawn mower. Officer Llewellyn and petitioner went to the rear of the house, entered the house through the back door, and a phone call was made to petitioner's radio dispatcher at Hennis Motor Freight. **The officer determined that the petitioner did in fact have permission to stop at that house and that the lawn mower was, in fact, in the back yard** (A. 17-18).

Officer Judge, who assisted in arresting Molkenbur, testified that he never asked petitioner if he could conduct the search of the premises, but that a search of the house was in fact conducted (A. 16, 24). The police officers had made no application for an arrest warrant or search warrant and no warrants of any kind were ever obtained (A. 16-21).

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[3] Detective Ubben first testified that Kathleen Rohlfing told him over the phone that a box was being unloaded from the truck; however, on further cross-examination, he said she may **not** have mentioned that there was a "box". He said she may have mentioned "freight" (A. 78).

The Court of Appeals acknowledged that Kathleen Rohlfing **did not see the box being unloaded** from the truck, however, the opinion states that Kathleen Rohlfing relayed what was seen by her mother and sister to detective Ubben (App. A, *infra*, p. 3).

After petitioner's arrest on the front sidewalk and while petitioner and the officers were in the house, Detective Ubben and his partner, William Tipolt, arrived at 1509 E. Gano in another squad car. They drove into the alleyway at the rear of the residence. From there, these officers observed a large partly torn open cardboard carton located near the rear of the backyard, just inside the 3½ or 4 foot cyclone fence. The carton lay between the fence and hedge row located in the back yard. The hedge obstructed the view from the house to the carton. Detective Ubben saw Officer Llewellyn near the rear of Toler's house and called to him, directing his attention towards the carton. Llewellyn walked around the hedge towards the fence and was then able to observe the cardboard box. At that time, the police had no knowledge that the box was part of an interstate shipment and Detective Ubben specifically testified that he had **no knowledge that a box of shirts had been stolen** (A. 23, 40-41).

Thereafter, Detective Ubben and Tipolt drove around to the front of the house, entered the back yard and arrested Toler while he was standing at the back door to the house. The police searched the house after Toler's arrest (A. 16). Toler did not give permission to the police to search the house or the premises (A. 19). After Toler's arrest, Officer Tipolt returned to the back yard, retrieved the box and its contents, and delivered same to police headquarters. Later, the police, while searching the inside of the box, without a warrant, discovered shipping documents in the bottom of the carton which identified the manufacturer and its order number. At the trial, a representative of the manufacturer was able, through the shipping documents, to identify the merchandise as moving in interstate commerce on the day of the arrest (App. A, *infra*, pp. 3-4).

3. **Petitioner's Motion to Suppress Evidence, the Government's Contention at Trial and the District Court's Ruling.**

Petitioner's Motion to Suppress, filed prior to trial, requested the Court to suppress as evidence (1) the carton or box containing the men's sport shirts; (2) the sport shirts; and (3) all evidence obtained as a result of leads supplied by such evidence, including all statements made by defendant (A. 8-9). Co-defendant Toler filed a similar motion. Petitioner urged in his Motion to Suppress and at the pre-trial hearing held on said motion, that petitioner's arrest was unlawful for the reason that the government had failed to establish that the police officers had probable cause to arrest him and further, that assuming *arguendo* the government did have probable cause to arrest him, the subsequent search and seizure were in violation of the United States Constitution (A. 8-9, 28-29).

Although the government urged at trial that the police officers did have probable cause to arrest petitioner, the government contended that the police officers' entrance to the property "was not made by reason of the arrest" (Government's Memorandum in Opposition to Motion to Suppress, p. 3). The government sought to justify the police officers' warrantless search and seizure on the basis that the police officers, after petitioner's arrest were invited into the back yard and into the house by petitioner to verify his statement regarding his having permission to stop at 1509 East Gano (Government's Memorandum, pp. 3-4).

Petitioner's Motion to Suppress was overruled by the trial Court after a hearing. The Court did not file a written opinion, however, the Court did indicate at the hearing that he was of the opinion that (1) there had been no "search", and (2) **the government can seize**

goods without a warrant if found on a suspect's premises, even though the government does not know the goods have been stolen (A. 28-29).

The petitioner objected during the trial to the introduction into evidence of the box and the packing slips, which were subsequently found in the bottom of the box the evening of April 16 (A. 43-44). Petitioner's objections were overruled by the trial Court.

4. The Opinion of the Court of Appeals.

The Court of Appeals held that it was unnecessary to consider the validity of petitioner Molkenbur's arrest (App. A, *infra*, p. 7). The Court held that the carton was "found and lawfully seized as an incident of Toler's arrest [and] was properly admitted against Molkenbur" (App. A, *infra*, p. 7).

The Court of Appeals rejected petitioner's contention that the government was barred from asserting for the first time on appeal its alternate theory that the box was seized incident to Toler's arrest, and not seized (as contended at trial) pursuant to petitioner's alleged consent. The Court of Appeals held that petitioner's contention was without merit for the reason that both petitioner and co-defendant Toler filed motions to suppress evidence which were considered by the trial Court.

The Court of Appeals concluded that this Court's holding in **Ker v. California**, 374 U. S. 23, was dispositive of this case. The Court's opinion analogizes the warrantless seizure of marijuana laying in plain view in **Ker**, with the facts in this case.

The Court of Appeals also distinguished the First Circuit Court of Appeals' reversal in **Niro v. United States**, 388 F. 2d 535, on the basis that in **Niro**, the police had

knowledge of defendant's possession of stolen goods approximately 12 hours prior to the warrantless seizure, whereas, here, the police officers had no prior knowledge that anything had been stolen or that defendants possessed any stolen goods.

REASONS FOR GRANTING THE WRIT

I

The government, in contending that the seizure of the merchandise found within the curtilage was lawful, changed theories on appeal.

The Court of Appeals, without citing any authority, holds that the government may assert for the first time on appeal, an alternate theory in support of its contention that the seizure of the merchandise by the police was lawful. Petitioner objected to such practice, contending that the government could not properly speculate for the first time on appeal about what **might** have occurred at the time of the arrest of petitioner and co-defendant. To permit the government to make such a change **after trial** is in contradiction to all basic notions of criminal jurisprudence and proper trial procedure.

The highly unusual procedure by the government and specifically condoned by the Court of Appeals should be reviewed by this Court under this Court's supervisory powers. For, if the Court of Appeals' decision stands, it will open the flood gates and permit **any party** in any lawsuit, including a defendant in a criminal cause, to contend one thing at trial, but on appeal change his strategy and contend differently. Analogizing, if the Court of Appeals' decision stands, then **defendants** in criminal cases should be permitted on appeal to object to the introduction of prejudicial evidence at trial, although

not objected to at trial by defense counsel. We submit that such a practice will revolutionize criminal practice in federal district courts.

The government relied upon **Morris v. Boles**, 4 Cir., 386 F. 2d 395, to support its contention that it could change its factual and legal theories on appeal. In **Morris**, the Court held that a search conducted in reliance on a void warrant may nevertheless be valid if, even without a warrant, the search was incident to a lawful arrest. However, **Morris** does not support the government's contention here. In **Morris**, the prosecutor did not rely on the void warrant **at trial**. *Contra*, the prosecutor **at trial** contended that the search was incident to a lawful arrest. In the instant case, the government never once contended at trial that the seizure of the box was made incident to the arrest of co-defendant Toler. Nor did the police officers so testify.

We respectfully urge this Court to review, pursuant to its supervisory powers, the Court of Appeal's holding that the government has a right to assert for the first time on appeal an alternate theory in support of its contention that the seizure of the merchandise was lawful. Such a practice is not only very unusual, but could lead to abuses in other cases.

II

The Fourth Amendment was violated when police officers seized merchandise found within the curtilage; without a warrant of any kind; without the consent of either the owner of the premises or the co-defendant; and without knowledge that the seized merchandise was stolen.

Petitioner was arrested by the police on suspicion of stealing over fifty dollars while he was standing on the sidewalk in front of his house at 1509 East Gano (A.

15, 20, 47). Immediately after petitioner's arrest, officers Judge and Llewellyn asked him about the removal of a box from his truck and he stated that he had removed a lawnmower from the truck but did not admit removing a box. The officers next asked petitioner if he had been authorized to stop at 1509 East Gano, and petitioner replied that he did have such permission. This fact was confirmed by the officers by their calling petitioner's dispatcher on the telephone prior to the time the box was found and seized by the police (A. 16).

At trial, the government filed a written memorandum urging that the police officers' entrance into the house and the enclosed back yard "was not made by reason of the arrest," but that it was made pursuant to petitioner's invitation. Thus, the government apparently sought at trial to rely upon defendant's post-arrest "invitation" to establish consent to the warrantless search and seizure.

Petitioner urged at trial and on appeal that the government did not sustain its burden of proving voluntary consent, relying on the following cases: **Bumper v. State of North Carolina**, 391 U. S. 543; **Wren v. United States**, 10 Cir., 352 F. 2d 617; **Simmons v. Bomar**, 6 Cir., 349 F. 2d 365; **Judd v. United States**; D. C. Cir., 190 F. 2d 649; **Oliver v. Bowens**, 9 Cir., 386 F. 2d 688.

In **Bumper**, this Court held that:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given," 391 U. S. at 548.

Clearly, the government did not sustain its burden of proving that the petitioner intelligently and voluntarily consented to the search and the seizure of the box of men's shirts. Thus, the contention relied upon by the

government at trial is clearly without basis in law or in fact. The Court of Appeals did not consider the issue.

On appeal, the government took the position that the seizure of the merchandise was made incident to a lawful arrest. First, the government argued that the seizure was made incident to the arrest of **petitioner** and then in the alternative, urged that the seizure was made incident to the arrest of co-defendant **Toler.**

The burden of proving probable cause was on the government and we submit that it failed to sustain said burden here. **United States v. Elgisser**, 2 Cir., 334 F. 2d 103, 110; **United States v. Burhannon**, 7 Cir., 388 F. 2d 961; **Wong Sun v. United States**, 371 U. S. 471. Here, the police had information from its informant, Mrs. Kathleen Rohlting, and her mother, Mrs. Berghofer, that an unknown driver of a truck and another person were seen unloading some boxes from a truck during the middle of the day on April 1, 1969. Detective Ubben was not able to confirm the fact that boxes were unloaded on April 1, but merely noticed that on April 12, 1969, someone later identified as petitioner, parked a Hennis truck in front of the house, went into the house, stayed a short time and drove off in the truck. Detective Ubben did not observe any boxes or freight being unloaded and had no knowledge that any goods had been stolen from a Hennis truck (A. 25, 28). Although Detective Ubben determined that the Hennis truck had no scheduled stops at that address on April 1 or 12, the dispatcher for Hennis Freight, who was called as a government witness, testified that a driver could properly stop for lunch at any restaurant or house during the middle of the day without advising the dispatcher where he was stopping (A. 51). Thus, in light of the fact that petitioner was the owner of the house, the above obviously did not establish probable cause to arrest.

On April 16, the day of petitioner's arrest, **informant Kathleen Rohlfing was the only person who spoke to any of the police officers** (A. 33). She was called as a government witness and testified that **she did not see any package or box on that day** (A. 39). She specifically testified that she did not see the large box marked, "Government Exhibit No. 1" and that all she told the police was that a truck was parked in front of the house. She did not even tell Detective Ubben that petitioner and co-defendant Toler were there.

The Court of Appeals acknowledges in its opinion that the informant did not see any of these packages or a box on the day of the arrests. The Court of Appeals stated:

> "While she was speaking to Ubben, the other ladies reported seeing the driver take a large package from the truck and hand it over the fence to Toler, who dragged it to the rear of the house. The caller relayed this additional information to Ubben, who, in turn, transmitted this report for broadcast by police radio (App. A, pp. 2-3, *infra*).

Thus, **the Court of Appeals acknowledges that the informant did not have personal knowledge of the pertinent information necessarily relied upon by the government to establish probable cause.** Also, we submit that the Court of Appeals erroneously found that the informant relayed the additional information to Detective Ubben concerning what the informant's mother apparently saw. Contrariwise, Kathleen Rohlfing testified that **all** she told the police was that a truck was parked in front of the house. She did not even tell Officer Ubben that petitioner and co-defendant Toler were there (Tr. 55).

Additionally, the police officers did not know that a box of shirts had been stolen until **after** petitioner was arrested, until **after** co-defendant Toler's arrest, until **after**

the box was seized and searched at the police station and until **after** further investigation was made.

Probable cause requires more than mere suspicion or strong reason to suspect. **Henry v. United States,** 361 U. S. 98, **Johnson v. United States,** 333 U. S. 10. Further, probable cause cannot be established by the fruits of the search and seizure and by other after-acquired information. **Henry v. United States,** 361 U. S. 98.

The Court of Appeals opinion is in direct conflict with this Court's holdings in **Aguilar v. Texas,** 378 U. S. 108 and **Spinelli v. United States,** 393 U. S. 410; and with the Eighth Circuit's previous opinion in **Pigg v. United States,** 8 Cir., 337 F. 2d 302.

In **Pigg,** the police saw the defendant carrying a box late at night under suspicious circumstances, but did not know a box had in fact been stolen. In the instant case, Detective Ubben admitted that he did not know that a box had been stolen until **after** petitioner's and co-defendant's arrests and **after** the seizure and search of the box. The police had to make an additional search of the box at the police station before they knew where the box even came from and where it was going. The Court of Appeals reversed the conviction in **Pigg** because the police had no knowledge that anything had been stolen. Thus, under the teachings of **Pigg** and the cases cited in that opinion, the police clearly did not have probable cause to arrest petitioner or Toler in the instant case. Additionally, here, the police did not see petitioner or Toler with the box, whereas in **Pigg** they did see him with the box.

Clearly, the evidence in this case establishes that Detective Ubben's **informant neither advised that she observed the box nor advised of the source of the information related.** Unaware of the source of the informant's tip and relying solely upon the reliability of the inform-

ant, Detective Ubben's arrest of co-defendant Toler was without probable cause. The requirements of the two-pronged test of **Aguilar** clearly were not fulfilled. **Aguilar**, 378 U. S. at 114. That Detective Ubben believed his informant is of no consequence. **Spinelli**, 393 U. S. at 418. It is of no consequence that the police officer's later search of the box disclosed information which enabled them to determine that the merchandise had been stolen and was moving in interstate commerce. **Johnson v. United States**, 333 U. S. 10, 16-17.

Even assuming *arguendo* that petitioner's arrest and co-defendant's arrest were lawful, the subsequent seizure was in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution. Here, the police did not have a search warrant prior to searching the entire house and seizing the box that was located within the curtilage. Thus, petitioner's arrest in front of his house and the co-defendant's arrest at his back door could not possibly have given the police the lawful right to search the entire house and the right to seize the merchandise that was in the enclosed back yard hidden from view of the back door to the house. **Agnello v. United States**, 269 U. S. 20, 32; **Trupiano v. United States**, 334 U. S. 699; **Chimel v. California**, 395 U. S. 752; **Niro v. United States**, 1 Cir., 388 F. 2d 535.

The Court of Appeal's opinion is in direct conflict with the First Circuit's opinion in **Niro**. In **Niro**, the officer saw known contraband in the back room of a warehouse which **they knew had been stolen**. The officers were not trespassers when they viewed the contraband for they had been given permission by the owner to enter that portion of the building that was not rented to the defendants. It was from this front room where the officers saw the contraband. The officers arrested the defendants in the front room before seizing the contraband located in the back room.

The Court in **Niro** reversed the conviction stating that although the officers had probable cause to make the arrest and properly observed the contraband from premises to which they were lawfully admitted, the officers must still have a search warrant. Thus, the holding in the instant case is in direct conflict with the First Circuit's opinion in **Niro.**

Here, the police officers who arrested co-defendant Toler and seized the box were not lawfully admitted to the premises. Neither Detective Ubben nor his partner Tipolt had warrants of any kind and were not invited onto the premises by either petitioner or co-defendant Toler. Thus, the question becomes: Can police enter a person's home and curtilage without warrants of any kind for the purpose of arresting persons living at said premises and for the purpose of seizing merchandise in plain view which the police suspect is stolen property but which they have no knowledge of it being stolen? We urge this Court to grant the writ and review this novel and important question.

The Court of Appeals states that "the holding in **Ker v. California**, 374 U. S. 23, is dispositive of this case." We submit that the Court of Appeal's reliance upon **Ker** is misplaced.

In **Ker**, this Court in a narrow five to four decision, upheld the seizure of marijuana that was in plain view and **was immediately recognizable by the police officer as contraband.** Here, the police officers testified that they had no knowledge that the property was stolen at the time of the seizure, thus, the police did not know the box contained contraband. Further, in **Ker**, this Court held that the police did not have probable cause to arrest Mrs. Ker until **after** the police entered the apartment and saw the marijuana in the kitchen. Even this did not establish probable cause by itself, for the Court reasoned that

the police also knew that the apartment was being used as a base of operations for drug traffic. In the instant case, the police had no information regarding co-defendant Toler, his identification or that he was in any way connected with the box. Nor did the police have any knowledge that the residence was being used for a base of illicit operations. Thus, **Ker** does not apply here.

Additionally, in **Ker**, the majority of this Court concluded that the police officers were lawfully upon the premises when the marijuana was seized. Here, the police officers were lawfully in the alley, however, **they had no lawful right to forcibly enter co-defendant's premises without warrants of any kind.** As held by the Court of Appeals, it was not until after the police officers made their entry onto the premises that the police officers arrested Toler and seized the merchandise. Thus, **Ker** does not support the government here.

Similarly, the Court of Appeals' reliance upon this Court's decision in **Harris v. United States**, 390 U. S. 234, is misplaced. In **Harris**, pursuant to a department regulation, a police officer searched an impounded car that had been seen at the scene of a robbery. The search completed, the police officer opened the door for the lawful purpose of rolling up the windows. Upon opening the door, the officers saw, exposed to plain view, the auto registration card belonging to the victim of the robbery. This Court held that the use of the card in evidence was proper.

In the instant case, the police officers did not have knowledge that the shirts were stolen, whereas, in **Harris**, the police officers instantly recognized the materiality and pertinence of the auto registration card that came into plain view. Further, as Mr. Justice Douglas stated in his concurring opinion, this Court's holding in **Preston v. United States**, 376 U. S. 364, survives for the reason that in **Harris**, the automobile was in lawful custody of the

police, and the police were responsible for protecting it. Mr. Justice Douglas also stated that the police were not engaged in an inventory or other search of the car.

III

The warrantless search at the police station of the box after defendants' arrests were not incidental to their arrests.

The warrantless search at the police station of the box containing the men's shirts and the seizure of the packing slips, after petitioner's arrest and after his being taken in custody to the police station, were too remote in time or place to have been incidental to petitioner's arrest. **Preston v. United States**, 376 U. S. 364; **United States v. Nikrasch**, 7 Cir., 367 F. 2d 740, 743. The Court of Appeal's decision here is in direct conflict with the Tenth Circuit's opinion in **Faubion v. United States**, 424 F. 2d 437. Further, the Court's reliance on this Court's recent opinion in **Chambers v. Maroney**, ... U. S. ..., is erroneous for the reason that **Chambers** involved a search of a car. Here the police searched personal property seized within the curtilage of a man's home.

CONCLUSION

For all the reasons advanced, the petition should be granted.

Respectfully submitted

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Attorneys for Petitioner Molkenbur

APPENDIX.

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 19,854

United States of America,
Plaintiff-Appellee,

v.

Robert Joseph Molkenbur,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 14, 1970]

Before Blackmun,* Mehaffy and Bright, Circuit Judges.

Bright, Circuit Judge.

Robert Molkenbur and Ernest Toler were indicted for unlawful possession of merchandise valued at more than $100.00 stolen from an interstate shipment in violation of 18 U. S. C., § 659. The jury convicted both defendants, and only Molkenbur appeals.

He contends that the trial court erred in permitting the prosecution to introduce, over objection, a carton containing one-hundred-forty-two packaged men's sport shirts and packing slips. Appellant contends the police seized

* Blackmun, Circuit Judge, took no part in the disposition of this case.

these items without a warrant in violation of his Fourth Amendment rights. The trial court, Chief Judge Harper, denied this contention, rejected defendant's motions to suppress the evidence at a pretrial hearing and permitted the prosecution to introduce these exhibits at trial. We sustain the trial court's ruling and affirm the conviction.

We review the pertinent facts. Defendant Molkenbur, as a truck driver for Hennis Truck Lines in St. Louis, Missouri, operated a large tractor-trailer unit. He delivered interline freight to various local truck terminals prior to its trans-shipment outside of St. Louis. On April 1, 1969, Molkenbur drove his truck unit to a residential address in St. Louis owned by him but occupied by his nephew, co-defendant Ernest Toler, and the latter's family. A Mrs. Berghofer, visiting in her daughter's home located across the street from the Toler dwelling, reported to police a few days later that she saw Molkenbur remove three cartons from his truck and hand them over the front yard fence to Toler. The St. Louis police investigated. On April 12, police officer Herman Ubben of the freight and junk squad observed a Hennis Truck Lines tractor-trailer unit stop in the street adjacent to Toler's residence. Ubben called the Hennis Truck Lines office and learned that the driver's stop on this occasion, as well as the one reported earlier, were unauthorized.

Molkenbur's arrest occurred on April 16. On that date, Mrs. Berghofer and her two daughters, while visiting in the premises across the street from the Toler home, saw Molkenbur again drive the Hennis Truck Lines tractor-trailer unit to the front of the Toler residence. One daughter who knew Officer Ubben telephoned him at police headquarters to report the stop. While she was speaking to Ubben, the other ladies reported seeing the driver take a large package from the truck and hand it over the fence to Toler, who dragged it to the rear of the house. The

caller relayed this additional information to Ubben, who, in turn, transmitted this report for broadcast by police radio. A few moments later, a police car containing Sergeant Llewelyn and Corporal Judge drove to the front of the Toler residence. The officers observed Molkenbur standing near his truck. They arrested him on suspicion of theft, advising the defendant that he had been seen removing merchandise from his truck. Molkenbur explained that he had removed a power lawn mower from the truck and delivered it to his nephew Toler with the permission of his company. He invited the officers to examine the mower in Toler's yard and to verify his authority by calling his company dispatcher. The two police officers inspected a lawn mower in Toler's yard and accompanied Molkenbur into the kitchen, where he telephoned his employer. In the meantime, Officer Ubben and his partner, William Tipolt, arrived at the Toler address in another squad car which they drove into the public alleyway at the rear of the Toler residence. From there, these officers observed a large, partly-torn-open cardboard carton located near the rear of Toler's yard, just inside a three-and-one-half or four foot chain-link fence. The carton lay between the fence and a hedge row located in back of the house. The hedge partially obstructed the view from the house toward the back yard. Ubben saw Sergeant Llewelyn near the rear of Toler's house and called to him, directing his attention toward the merchandise in the cardboard box. Llewelyn then walked toward the fence and saw these items. Thereafter, Ubben and Tipolt entered the yard and arrested Toler for suspected theft. After the arrest, Tipolt retrieved the box and its contents and delivered these items to police headquarters. Later, the police, while examining the box and its contents without a warrant, discovered shipping documents in the bottom of the carton which identified the manufacturer and its order number. At the trial, a representative of the manufacturer was

able, through the shipping documents, to identify the merchandise as moving in interstate commerce on the day of the arrest.

On this appeal, Molkenbur contends the officers had no probable cause to arrest him and, thus, the search and seizure of the merchandise without a warrant violated his Fourth Amendment rights. He contends, further, that his arrest on the street, if a valid one, will not justify a search in Toler's yard. Finally, Molkenbur urges that the warrantless search of the cardboard carton at the police station, leading to the discovery of packing slips, further violated his constitutional rights. The government urges, in response, that police possessed probable cause to arrest Molkenbur, that as a proper incident of that arrest the police searched and seized the container of merchandise, or, alternatively, that the search and seizure occurred as an incident to the defendant Toler's arrest. In reply, appellant denied appellee's right to assert for the first time on appeal the alternate theory of a seizure incident to Toler's arrest. This latter contention lacks any support in the record since the trial court considered the validity of the seizure in connection with the arrest of each defendant.

Judge Harper, in a combined hearing on similar motions of both defendants to suppress the carton and its contents as evidence, commented that the officers discovered the evidence without a search. We agree with this observation. This case falls outside the "search" provision of the Fourth Amendment. Police officers who see objects in plain view discover them without any search. In *Harris v. United States*, 390 U. S. 234 (1968),[1] the Supreme Court said:

[1] Not to be confused with *Harris v. United States*, 331 U. S. 145 (1947), also a search and seizure case, overruled by *Chimel v. California*, 395 U. S. 752 (1969).

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. (Citations omitted.) 390 U. S. at 236.

Seizures without searches, as well as seizures with searches, fall within the proscription of the Fourth Amendment assuring "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . ." In this case, the police seized the merchandise in question within the curtilage, which is entitled to the same protection as the home against search and seizure. *United States v. Taylor*, ... F. 2d ... (8th Cir., No. 19549, June 8, 1970). Courts apply stricter standards in determining the validity of a search and seizure in a home as compared to an automobile. See *United States v. Davis*, 423 F. 2d 974, 977 (5th Cir. 1970); compare *Chambers v. Maroney*, ... U. S. ... (No. 830, June 22, 1970), with *Vale v. Louisiana*, ... U. S. ... (No. 727, June 22, 1970), and *Chimel v. California*, 395 U. S. 752 (1969). To seize articles in plain view, police officers must rightfully be in a position to have that view without the opportunity, as a practical matter, of obtaining a search warrant before making the seizure. See *Harris, supra*, 390 U. S. 234 (seizure from defendant's automobile); *Ker v. California*, 374 U. S. 23 (1963) (seizure from defendant's home). However, the fact that officers obtain their view of items valuable as evidence through an unlawful entry into the defendant's dwelling house or upon defendant's real property (*e. g., Stoner v. United States*, 376 U. S. 483 (1964); *Chapman v. United States*, 365 U. S. 610 (1961); *Jeffers v. United States*, 342 U. S. 48 (1951); *Johnson v. United States*, 333 U. S. 10 (1948)) or fail to obtain a warrant under circumstances where they earlier discover, or reasonably suspect the existence of the in-

criminatory evidence for a substantial period of time (*e. g., McDonald v. United States*, 335 U. S. 451 (1948); *Trupiano v. United States*, 334 U. S. 699 (1948); *Taylor v. United States*, 286 U. S. 1 (1932)) renders the seizure invalid and bars the use of the questioned items as evidence.

We believe the holding in *Ker, supra*, 374 U. S. 23, is dispositive of this case. There, officers, after making a "no knock" entrance into a dwelling house to arrest a suspect as authorized by California law, discovered a brick of marijuana laying in plain view and another person, the suspect's wife, within the dwelling house. This discovery furnished the law enforcement officers with additional information sufficient to justify the arrest of the suspect's wife based on probable cause to suspect her of participation in the commission of a felony. The court held that such warrantless seizure of the marijuana as an incident of that arrest did not exceed constitutional bounds.

The facts in the instant case justifying Toler's arrest and the seizure of the stolen merchandise are stronger than in *Ker, supra*, 374 U. S. 23. Ubben and Tipolt discovered the men's clothing bearing the manufacturer's label in plain view without first entering the premises. This discovery, together with the information that these officers had received via the police radio, furnished an appropriate basis for Toler's arrest as a person participating in the commission of a felony, that of possessing stolen property valued at more than $50.00.[2] Missouri statutes authorize an officer to break into "a dwelling house . . . or any other enclosure" to make an arrest

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[2] Vernon's Ann. Mo. Stat., §§ 560.161, 560.270 (Supp. 1969).

in criminal actions.[3] Ubben, thus, acted in a manner authorized by Missouri law.[4]

Appellant Molkenbur incorrectly characterizes the circumstances in this case as a search and seizure incident to his own arrest. Sergeant Llewelyn, who arrested Molkenbur, neither seized nor directed the seizure of the stolen merchandise. Appellant raises no serious question concerning the validity of Toler's arrest. The evidence found and lawfully seized as an incident of Toler's arrest was properly admitted against Molkenbur. The fact that the articles discovered as an incident of this arrest incriminated Molkenbur, as well as Toler, does not violate Molkenbur's Fourth Amendment rights, even though this discovery works to his misfortune. *United States ex rel. Spero v. McKendrick*, 409 F. 2d 181 (2d Cir. 1969); *United States v. Cole*, 365 F. 2d 57 (7th Cir. 1966), *cert. denied*, 385 U. S. 1027 (1967); see *Frazier v. Cupp*, 394 U. S. 731, 740 (1969). Thus, we find it unnecessary to consider the validity of Molkenbur's arrest as a basis to support the admissibility of the questioned evidence.

The facts here are closely akin to *Taylor, supra*, . . . F. 2d . . ., in which we sustained the right of police officers not armed with a warrant to enter a private driveway of a home, arrest an occupant of a motor vehicle parked in that driveway and seize stolen merchandise in plain view. A police officer seeing a suspect engaged in the commission of a felony and in possession of apparently stolen merchandise may proceed with an arrest and a seizure incident

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[3] Vernon's Ann. Mo. Stat., § 544.200 (1953); see *State v. Novak*, 428 S. W. 2d 585 (Mo. 1968).

[4] State law determines the validity of an arrest, unless violative of the Constitution. *Miller v. United States*, 357 U. S. 301, 305 (1958); *United States v. Di Re*, 332 U. S. 581, 589 (1948); *Klingler v. United States*, 409 F. 2d 299, 302 (8th Cir.), *cert. denied*, 396 U. S. 859 (1969); *Theriault v. United States*, 401 F. 2d 79, 81 (8th Cir. 1968), *cert. denied*, 393 U. S. 1100 (1969).

to that arrest since the evidence "could be destroyed if not seized immediately." *Taylor, supra,* ... F. 2d ... (slip opinion p. 8). Cf. *Marron v. United States,* 275 U. S. 192 (1927). In this case, too, unless the officers immediately seized the articles of men's wear, which were located on private property, they possessed no effective means of preventing their removal or destruction. Officer Tipolt acted reasonably in immediately preserving the evidence.

Appellant relies on *Niro v. United States,* 388 F. 2d 535 (1st Cir. 1968), for reversal. As we noted in *Taylor, supra,* ... F. 2d ..., *Niro* may be distinguished, since police authorities had knowledge of defendant's possession of stolen goods approximately twelve hours prior to the warrantless seizure, but, despite that knowledge, neglected to obtain a search warrant. Here, as in *Ker, supra,* 374 U. S. 23; the fortuitous discovery by police of incriminating evidence, which, added to other information possessed by them, contemporaneously produced probable cause to arrest a defendant, his actual arrest and incidental seizure of the items introduced as evidence.

Appellants further claim that the police officers needed a warrant to examine and inventory the cardboard container and its contents lacks merit. Having properly seized the apparently stolen merchandise, the police are authorized to thoroughly examine the objects of the seizure later at police headquarters without a warrant. See *Chambers, supra,* ... U. S. ...: *Cooper v. California,* 386 U. S. 58 (1967).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

St. Louis, Missouri 63101
Robert C. Tucker, Clerk

Mr. John L. Boeger
408 Olive Street
St. Louis, Missouri 63102

Re: No. 19854. U. S. A. v. Molkenbur

Dear Sir:

Enclosed herewith, for use of counsel for appellant, printed copy of the opinion of this Court prepared by Judge Bright filed today in the above case. Judgment of this Court in accordance with the opinion is also entered today and also provides that the defendant in the District Court, Robert Joseph Molkenbur, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

Very truly yours

Robert C. Tucker,
Clerk

eh
enc.